No. 94-624

Supreme Court, U.S.
F I L E D
NOV 9 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOAN DAWSON, PAUL DAWSON and TANDRA DAWSON,

Petitioners,

—against—

DONALD M. HALPERIN, Commissioner of the New York State Division of Housing and Community Renewal, and THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

RESPONDENT DONALD M. HALPERIN'S BRIEF IN OPPOSITION

G. OLIVER KOPPELL
Attorney General of the
State of New York
Attorney for Respondent
Donald M. Halperin
120 Broadway
New York, New York 10271
(212) 416-8618

JERRY BOONE
Solicitor General
Counsel of Record

CHARLES F. SANDERS
JUNE DUFFY
Assistant Attorneys General
of Counsel

Questions Presented

1. Did the New York State Court of Appeals properly dismiss petitioners' appeal on the ground that the issues presented have become moot.

2. Do the New York rent control provisions which protect a tenant who has resided in an apartment for twenty years or longer from eviction by a landlord seeking possession of the apartment for his personal use violate any right guaranteed petitioners under the Fifth, Thirteenth or Fourteenth Amendments to the Constitution of the United States.

TABLE OF CONTENTS

PAGE

Questions Presented i

Table Of Authorities ..... iv-vi

Introduction 1

Statement Of The Case 2

A. New York's Protection Of Tenants Who Have Resided In Rent Controlled Apartments For Twenty Years Or Longer 2

B. Prior Proceedings 4

REASONS FOR DENYING THE WRIT 6

I. The Issues Which Petitioners Raise In This Proceeding Have Been Rendered Moot By The Permanent Departure Of The Tenants From Their Apartments 6

II. The Challenged Provisions Do Not, In Any Event, Effect A Taking Of Petitioners' Property 7

A. There Has Been No Physical Taking ... 9

B. There Has Been No Regulatory Taking. 11

1. Economically Viable Use Of Property 12

PAGE

2. Advancement Of Legitimate State Interests..... 13

Conclusion 15

TABLE OF AUTHORITIES

Cases:	PAGE
Agins v. City of Tiburon, 447 U.S. 255 (1980)	12
Barbier v. Connolly, 113 U.S. 27 (1884)	7
Benson Realty Corp. v. Beame, 50 N.Y.2d 994 (1980), *appeal dismissed*, 449 U.S. 1119 (1981)	8
Block v. Hirsch, 256 U.S. 135 (1921)	13
Bowles v. Willingham, 321 U.S. 503 (1944)	8, 13
Braschi v. Stahl Associates Co., 74 N.Y.2d 201 (1989)	13
Bucho Holding Co. v. Temporary State Housing Rent Comm'n, 11 N.Y.2d 464 (1962)	9
Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897)	7
Concrete Pipe and Products of California v. Construction Laborers Pension Trust for Southern California, 113 S.Ct. 2264 (1993)	12
Dolan v. City of Tigard, 114 S.Ct. 2309 (1994)	10, 12
Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)	12
First English Evangelical Lutheran Church v. Los Angeles, 482 U.S. 304 (1987)	6
Granat v. Keasler, 663 P.2d 830 (Wash. 1983)	14
Hadacheck v. Sebastian, 239 U.S. 394 (1915)	12
I.L.F.Y. Co. v. Temporary State Housing Rent Comm'n, 10 N.Y.2d 263 (1961), *appeal dismissed*, 369 U.S. 795 (1962)	9

PAGE

Kennedy v. City of Seattle, 617 P.2d 713 (Wash. 1980). 14

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).....7, 11, 12

Lavalle v. Scruggs-Leftwich, 133 A.D.2d 313 (1st Dep't 1987)..... 5

Loab Estates, Inc. v. Druhe, 300 N.Y. 176 (1949)..... 9

Lopez v. Mirabel, 127 A.D.2d 771 (2d Dep't 1987) ... 5

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).....8, 9, 13

McMurray v. DHCR, 135 A.D.2d 235 (1st Dep't), *aff'd*, 72 N.Y.2d 1022 (1988)..... 5

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 9, 11

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 12

Pennell v. City of San Jose, 485 U.S. 1 (1988) 8, 13

People ex rel. Durham Realty Corp. v. La Fetra, 230 N.Y. 429 (1921) 9

Polednak v. Rent Control Board of Cambridge, 494 N.E.2d 1025 (Mass. 1986) 14

Rent Stabilization Ass'n v. Higgins, 83 N.Y.2d 156 (1993), *cert. denied*, 114 S.Ct. 2693 (1994).....8, 13

Seawall Assoc. v. City of New York, 74 N.Y.2d 92, *cert. denied*, 453 U.S. 976 (1989).....4-5, 8, 11

Sobel v. Higgins, 188 A.D.2d 286 (1st Dep't 1992), *appeal dismissed*, 81 N.Y.2d 953, *leave to appeal denied*, 82 N.Y.2d 655 (1993) 5

PAGE

Sourian v. Higgins, 170 A.D.2d 258 (1st Dep't 1991). 5

Spring Realty Co. v. New York City Loft Board, 69 N.Y.2d 657 (1986), *appeal dismissed*, 482 U.S. 911 (1987) 8

Teeval Co. v. Stern, 301 N.Y. 346, *cert. denied*, 340 U.S. 876 (1950) 9

Yee v. City of Escondido, 112 S.Ct. 1522 (1992) 5, 8, 10, 12

Statutory and Regulatory Materials

9 NYCRR § 2204..... 3, 11

9 NYCRR § 2204.2..... 2

9 NYCRR § 2204.5(a)..... 2

New York City Admin. Code § 26-408 ..... 3, 11

New York City Admin. Code § 26-408(b)(1) 2

CPLR § 5601 4

Miscellaneous

Bill Jacket, 1984 Laws of New York, C.234..... 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-624

JOAN DAWSON, PAUL DAWSON and TANDRA DAWSON,

Petitioners,

—against—

DONALD M. HALPERIN, Commissioner of the New York State Division of Housing and Community Renewal, and THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

RESPONDENT DONALD M. HALPERIN'S BRIEF IN OPPOSITION

Introduction

Respondent Donald M. Halperin respectfully submits that the petition for a writ of certiorari should be denied in this challenge to New York State regulations which protect tenants who have resided in a rent-controlled apartment for twenty years or longer from eviction. The issues in this proceeding have, as the New York Court of Appeals held, become moot. Moreover, the decision of the Appellate Division upholding

the regulations is not in conflict with decisions of this Court or at odds with holdings in any other jurisdiction.

Statement Of The Case

A. New York's Protection Of Tenants Who Have Resided In Rent-Controlled Apartments For Twenty Years Or Longer

In order to evict a tenant from a rent-controlled apartment, a landlord, in most instances, must first obtain a certificate of no objection to eviction issued by the New York State Division of Housing and Community Renewal ("DHCR"). 9 NYCRR § 2204.2.

Under Section 26-408(b)(1) of the New York City Rent Control Law and Section 2204.5(a) of the City's Rent Control Regulations, a certificate of eviction may be issued "where the landlord seeks in good faith to recover possession of a housing accommodation because of immediate and compelling necessity for his own person use and occupancy, or for the personal use and occupancy of his immediate family. . ."

However, the rent control law and regulations prohibit the landlord from issuing such a certificate where the tenant is either disabled or over sixty-two years old, or has resided in the apartment for at least twenty years. § 26-408(b)(1), City Rent Control Law; 9 NYCRR § 2204.5(a).

The purpose of this prohibition has been stated as follows:

> Allowing landlords to evict senior citizens and disabled persons could result in financial and physical hardship. These individuals tend to be less mobile, of failing health, and have limited or fixed incomes. Areas with rent regulation have opted to have such regulations as a result of a declared housing shortage. These factors make it extremely difficult for these tenants to find safe, decent and affordable housing elsewhere.

> Similarly, long-term tenants of two decades are often elderly, although not 62 years of age, and have limited incomes. These tenants, by virtue of their longevity, have become an integral part of their community and have not violated their obligations to the landlord. In view of this, these individuals should be afforded protection from eviction since forcing them out of their housing accommodations after 20 years could have a devastating effect on them and their community.

Bill Jacket, 1984 Laws of New York, c. 234 at 8.

Despite the fact that a tenant who has resided in the same apartment for twenty years or longer may otherwise qualify for protection under these provisions, the landlord may nevertheless seek the tenant's eviction and recover possession for his own use where (1) the tenant is violating a substantial obligation of the tenancy, committing or permitting a nuisance, damaging the premises, substantially interfering with the comfort or safety of the landlord or other tenants, refusing the landlord access to make repairs, or refusing to execute a renewal lease; (2) a subtenant of the tenant is in occupancy after the expiration of any lease; (3) subject to certain conditions, possession is sought for the purpose of demolishing or substantially altering the premises; and (4) the landlord wishes to withdraw the premises from the market on the ground that its continued operation would impose undue hardship upon the landlord, and the rent regulatory authority finds that there is no reasonable possibility that the landlord can make a net annual return of 8 1/2% of the assessed value of the subject property and the landlord and the landlord's immediate predecessor have not intentionally or wilfully managed the property to impair the ability to earn such a return. N.Y.C. Admin. Code § 26-408; 9 NYCRR § 2204.

B. Prior Proceedings

In August, 1990, petitioners commenced this declaratory judgment action by filing a verified complaint in the Supreme Court of the State of New York challenging the constitutionality of the bar to the eviction of twenty-year tenants.

Petitioners had purchased a five-story brownstone in New York City in November, 1983. They knew, at the time, that the building contained at least two rent-controlled tenants who had lived in the building since 1970. (A. 3a).[1] In 1990, petitioners wished to evict these tenants in order to obtain the units for their own use and occupancy but believed they were prevented from doing so by reason of the protections afforded twenty-year residents by the challenged provisions. In their lawsuit, petitioners alleged that the enforcement of the provisions subjected them to a compelled tenancy, constituting a physical and regulatory taking of property and a violation of due process and the prohibition against involuntary servitude. (A. 18a-19a).

Following cross-motions for summary judgment, State Supreme Court dismissed the complaint in its entirety for failure to state a cause of action and upheld the constitutionality of the challenged provisions. (A. 16a-25a).

In April, 1994 the Appellate Division, First Department, unanimously affirmed the lower court's ruling. 197 A.D.2d 127 (1st Dep't 1994). (A. 2a-15a).[2] In its decision, the Appellate Division rejected petitioners' claim that the New York Court of Appeals' ruling in *Seawall Assoc. v. City of New*

---

[1] References preceded by "A" are to pages of the appendix to the petition.

[2] After the entry of judgment, petitioners sought a direct appeal as of right to the New York State Court of Appeals pursuant to CPLR § 5601(b)(2). By order entered October 29, 1992, the Court of Appeals transferred the appeal to the Appellate Division, First Department "upon the grounds that a direct appeal does not lie when questions other than the validity of a statutory provision are involved." (A. 26a).

York, 74 N.Y.2d 92, *cert. denied*, 453 U.S. 976 (1989), and this Court's decision in *Yee v. City of Escondido*, 112 S.Ct. 1522 (1992), required an invalidation of the challenged regulations. Rather, the court found that the tenant protections involved here are predicated on a pre-existing relationship between the owners and the tenants. Thus, the court concluded that no physical taking was effected since the restriction of the challenged regulations is imposed on existing tenancies where the landlords had already put their properties to use for residential housing. The court further concluded that the leases involved were not perpetual since there were numerous circumstances which might develop terminating the tenancy.

As to petitioners' claim of a regulatory taking, the court rejected the argument that the challenged regulations frustrated their reasonable investment-backed expectations. As the court pointed out, any reasonable expectations petitioners had of evicting the two tenants in question must have been a qualified one since they knowingly purchased a premises that was highly regulated. Further, the protection of long-term tenants was held to serve a legitimate government purpose.[3]

Additionally, the Appellate Division held that the regulations protecting twenty-year tenants from eviction do not compel petitioners to remain landlords against their will. In fact, the court found petitioners' claim of involuntary servitude, as well as their due process claim, "frivolous."

Petitioners' appeal to the Court of Appeals was thereafter dismissed as moot on July 7, 1994, after petitioners informed

---

[3] In rejecting the petitioners' takings arguments, the court pointed out that an identical challenge to these same regulations had recently been rejected in a previous case. *Sobel v. Higgins*, 188 A.D.2d 286 (1st Dep't 1992), *appeal dismissed*, 81 N.Y.2d 953, *leave to appeal denied*, 82 N.Y.2d 655 (1993). *See also Sourian v. Higgins*, 170 A.D.2d 258 (1st Dep't 1991); *McMurray v. DHCR*, 135 A.D.2d 235 (1st Dep't), *aff'd*, 72 N.Y.2d 1022 (1988); *Lopez v. Mirabel*, 127 A.D.2d 771 (2d Dep't 1987); *Lavalle v. Scruggs-Leftwich*, 133 A.D.2d 313 (1st Dep't 1987).

the court that the two twenty-year tenants residing in the petitioners' building had vacated their respective apartments. (A. 1a).

REASONS FOR DENYING THE WRIT

I. The Issues Which Petitioners Raise In This Proceeding Have Been Rendered Moot By The Permanent Departure Of The Tenants From Their Apartments

The New York State Court of Appeals dismissed petitioners' appeal on the ground of mootness after being informed by petitioners' counsel that the two tenants in their building who had resided there for more than twenty years had permanently left the premises. Petitioners now argue that the proceeding is not moot, even though the tenants have vacated the premises, because they suffered damages during the period when they could have evicted the tenants but were barred by New York regulations from doing so. They maintain that the dismissal of their appeal deprived them of compensation for a temporary taking under *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304 (1987), which held

> that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.

Id. at 321. Petitioners are mistaken.

In *First English*, the plaintiffs brought an inverse condemnation suit seeking damages for what they claimed was an uncompensated taking effected by restrictions which the County of Los Angeles had placed on the use of their property. They did not seek an injunction against the enforcement of the Los Angeles ordinance in question. This Court merely held that, should the plaintiffs prevail in establishing that the ordinance violated their constitutional rights, they would be

entitled to damages which they incurred during the temporary period when they were legally prevented from using their property as they wished.

Here, on the other hand, petitioners brought this declaratory judgment action solely to prohibit the State from implementing its regulations. They never suggested that they were seeking damages. Rather, they sought only to be able to evict their two tenants and use their property for their own personal enjoyment.

The fact that the tenants no longer reside in their building has rendered the case moot. Petitioners are now entitled to fully enjoy the use of their entire building. Their attempt to preserve this case by belatedly raising the possibility that they are entitled to damages for the period when the tenants remained in occupancy should be rejected.

II. The Challenged Provisions Do Not, In Any Event, Effect A Taking Of Petitioners' Property

Property interests are protected against governmental interference by two provisions of the United States Constitution: 1) the due process clause of the Fourteenth Amendment and 2) the taking without just compensation clause of the Fifth Amendment.[4]

Property rights under these constitutional provisions, however, are not absolute. Rather, such rights have long been subject to uncompensated restrictions through a state's exercise of its police power in prescribing regulations "to promote the health, peace, morals, education, and good order of the people." *Barbier v. Connolly*, 113 U.S. 27, 31-32 (1884). As this Court explained in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 (1987), "under our system of government, one of the state's primary ways of preserving the

[4] The just compensation clause is applicable to the states through the Fourteenth Amendment. *See Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 236 (1897).

public weal is restricting the uses individuals can make of their property . . . . These restrictions are 'properly treated as part of the burden of common citizenship'." (citation omitted).

With respect to landlords and tenants, this Court has noted that the " 'states have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.' " *Pennell v. City of San Jose*, 485 U.S. 1, 12 n.6 (1988) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982)). Similarly, in *Seawall Assoc. v. City of New York*, 74 N.Y.2d at 112 n.11, the New York Court of Appeals pointed out that "government has considerable latitude in regulating landlord tenant relationships to preclude eviction in hardship, emergency and rent-control cases."

Through the years, federal, state and local governments have, in response to significant housing shortages, enacted legislation declaring the existence of a serious public emergency and restricting the ability of landlords to raise rents and evict tenants. This Court and the New York Court of Appeals have consistently upheld these restrictions and rejected claims that such measures constitute an improper taking without just compensation.[5]

---

[5] *See, e.g., Yee v. City of Escondido*, 112 S.Ct. at 1522 (rent control ordinance did not amount to a physical taking); *Pennell v. City of San Jose*, 485 U.S. at 1 (rent control ordinance not facially unconstitutional); *Bowles v. Willingham*, 321 U.S. 503 (1944) (upholding federal law which fixed maximum rents that could be charged in defense-rental areas); *Rent Stabilization Ass'n v. Higgins*, 83 N.Y.2d 156 (1993), *cert. denied*, 114 S.Ct. 2693 (1994) (right of family members to succeed to rent stabilized tenancy did not effect a taking of landlords' property); *Spring Realty Co. v. New York City Loft Board*, 69 N.Y.2d 657 (1986), *appeal dismissed*, 482 U.S. 911 (1987) (statute providing loft residents with status as rent-stabilized tenants did not constitute a "taking"); *Benson Realty Corp. v. Beame*, 50 N.Y.2d 994, 996 (1980), *appeal dismissed*, 449 U.S. 1119 (1981) (rejecting claim that the continuation of the New York City Rent

Here, too, there has been no unconstitutional taking of a landlord's property. The challenged rent control provisions protect vulnerable persons from eviction where a landlord seeks their apartments for his own use and occupancy. Protecting such persons from eviction does not violate the petitioners' constitutional rights.

A. There Has Been No Physical Taking

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-435 (1982), this Court explained that where the character of governmental action is a permanent *physical* occupation—either by the government itself or by a third party authorized by the government to do so—a compensable taking will be found "to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." Elaborating on this rule, the Court, in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 832 (1987), found that a physical occupation—*per se* compensable—has occurred where the government gives a stranger or a third party "a per-

---

Control Law effects an unconstitutional taking); *Bucho Holding Co. v. Temporary State Housing Rent Comm'n*, 11 N.Y.2d 464 (1962) (finding that the provision of the Emergency Housing Rent Control Law which fixed the return to which a landlord is entitled was neither confiscatory nor unconstitutional on due process grounds); *I.L.F.Y. Co. v. Temporary State Housing Rent Comm'n*, 10 N.Y.2d 263, 268 (1961), *appeal dismissed*, 369 U.S. 795 (1962) (upholding rent control law and finding that "prohibitions against rent increases may in an emergency be constitutional although they reduce the value of the property regulated and deprive its owner of what otherwise would be considered a fair return"); *Teeval Co. v. Stern*, 301 N.Y. 346, 362 *cert. denied*, 340 U.S. 876 (1950) (holding that state rent control statute "does not contemplate a taking of the property of any landlord"); *Loab Estates, Inc. v. Druhe*, 300 N.Y. 176, 180 (1949) (upholding New York City law restricting the right of landlords to evict tenants and, in doing so, noting that "similar restrictions upon the power of a landlord" had previously been affirmed); *People ex rel. Durham Realty Corp. v. La Fetra*, 230 N.Y. 429 (1921) (state rent control law upheld in face of claim that it constituted an improper taking without just compensation).

manent and continuous right" to pass and repass across private property. *See also Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994).

Applying this standard, the Appellate Division properly rejected petitioners' physical taking claim, holding no physical taking of the landlords' property existed since there was hardly a permanent physical occupation by a stranger or third party given that the tenants were already residing on the premises when it was purchased by the petitioners.

Petitioners nevertheless argue that this Court's decision in *Yee v. Escondido*, 112 S.Ct. at 1522 requires a contrary result. Petitioners are mistaken. *Yee* involved a physical taking challenge stemming from the interaction of a recently-enacted local rent control ordinance and the California Mobile Home Residency Law which provided that renters of mobile home "pads" could unilaterally transfer their tenancies to unrelated third parties. Park owners were no longer free to set rents or decide who their tenants would be, and pad renters could sell their mobile homes in place at a premium to any outsider of their choice. The premium was attributable to the corresponding right to occupy the pad on which the home stood at a below-market rent. This Court rejected the owners' claim, holding that where owners voluntarily place their property on the rental market, the government may limit rents and require that landlords accept tenants whom they might wish to exclude. 112 S.Ct. at 1529.

It is true, as petitioners point out, that the Court in *Yee* suggested that laws which compel a landowner to refrain *in perpetuity* from terminating a tenancy might produce a different legal result. 112 S.Ct. at 1529. However, the rent control provisions challenged here do not require a landlord to remain in the rental market in perpetuity. Rather, they apply only to specific tenants. As the Appellate Division noted,

> the occurrence of a number of events would allow the landlord to recover [a twenty-year] tenant's housing accommodation. For instance, the landlord might recover

> the unit upon the tenant's death or upon the tenant's violation of a substantial obligation of the tenancy, or in instances where the tenant is committing acts constituting a nuisance or permitting the same or permitting the accommodation to be used for immoral or illegal purposes; or upon the landlord's decision to demolish or substantially alter the premises or to withdraw the premises from the rental market where there is no reasonable possibility [of] realizing a net annual return of $8^1/_2\%$ of the property's assessed value. (*See*, New York City Administrative Code § 26-408; 9 NYCRR § 2204.) Plaintiffs have failed to make a showing that these contingencies cannot occur. . . .

(A. 9a-10a).

Since the owners here voluntarily purchased property already used for residential housing and were only temporarily limited from withdrawing two units from the rental market, their takings claim is not supported by *Yee*. Their argument is thus without merit.

B. There Has Been No Regulatory Taking

Governmental action affecting private property may constitute a taking even if it does not result in the physical invasion of such property. However, since government could hardly function if it had to pay for every action that adversely affects economic value, courts have never found a taking merely because a regulation prevents the most profitable or beneficial use of particular property. Rather, regulatory takings have been found only when challenged actions do not substantially advance legitimate state interests or deny owners economically viable use of their property. *See, e.g., Nollan v. California Coastal Comm'n*, 483 U.S. at 834; *Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. at 485; *Seawall*, 74 N.Y.2d at 107. Petitioners have failed to make such a showing.

1. Economically Viable Use Of Property

To deprive an owner of the economically viable use of his land, a regulation must make it "impossible" or "commercially impracticable" for the owner to profitably engage in his business, or unduly interfere with the owner's reasonable "investment-backed expectations." *Keystone*, 480 U.S. at 485, 495-96; *Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124, 127, 136 (1978).

New York's rent control law was first enacted forty-two years ago. Any subsequent purchaser of rent-controlled housing was on notice that he was investing in a heavily regulated market with significant constraints on profit, eviction and disposal of property. Petitioners, therefore, cannot reasonably complain that the provisions unfairly interfered with their use of their property.

In any event, as this Court noted in a recent takings decision, *Concrete Pipe and Products of California v. Construction Laborers Pension Trust for Southern California*, 113 S.Ct. 2264, 2291 (1993):

> . . . our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking. *See, e.g., Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384, 47 S. Ct. 114, 117, 71 L.Ed. 303 (1926) (approximately 75% diminution in value); *Hadacheck v. Sebastian*, 239 U.S. 394, 405, 36 S.Ct. 143, 60 L.Ed. 348 (1915) (92.5% diminution).

See also Yee v. City of Escondido, 112 S.Ct. at 1529; *Dolan v. City of Tigard*, 114 S.Ct. 2309. Since petitioners have not demonstrated that they are suffering complete economic hardship,[6] they have failed to satisfy this prong of a regulatory takings claim.

---

[6] Indeed, petitioners do not disagree and admit that they cannot demonstrate economic hardship. Pet. at 13 n.7.

2. Advancement Of Legitimate State Interests

The purposes served by the provisions—the control of rental costs and the preservation of affordable housing and moderate income neighborhoods—are valid governmental concerns. *See, e.g., Pennell v. City of San Jose*, 485 U.S. at 13 ("a legitimate and rational goal . . . is the protection of consumer welfare"); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 440 ("The States have broad power to regulate housing conditions"); *Bowles v. Willingham*, 321 U.S. at 503 (upholding statute whose aim was "the effective protection of our price structure"); *Block v. Hirsch*, 256 U.S. 135 (1921) (approving rent control in Washington, D.C. on the basis of Congress' finding that housing in the city was "monopolized"). In *Pennell*, the Court identified the "preven[tion of] excessive and unreasonable rent increases," the "protection of consumer welfare" by limiting rents, and "reducing the costs of dislocation" as legitimate public purposes. 485 U.S. at 14 n.8.

The prevention of egregious evictions has long been considered a legitimate state interest, especially in the context of housing shortages. In fact, recent New York decisions have emphasized the proprietary of governmental action to reduce dislocation of residents from their apartments and communities. Thus, in *Braschi v. Stahl Assoc. Co.*, 74 N.Y.3d 201, 213 (1989), the Court of Appeals recognized one of the purposes of the rent control laws to be "the protection of individuals from sudden dislocation," (plurality opinion) or, as stated in the concurring opinion (Bellacosa, J.), "protection against one of the harshest decrees known to the law—eviction from one's home." *Id.* at 215; *see also Rent Stabilization Ass'n v. Higgins*, 83 N.Y.2d at 156 (1993) (family members residing in rent-controlled unit allowed to continue to do so upon named tenant's death).

Thus, the challenged provisions, which prevent the eviction of the most vulnerable members of the tenant population, sub-

stantially advance legitimate governmental purposes in a manner sufficient to survive constitutional scrutiny.[7]

---

[7] Petitioners argue that the decision of the Appellate Division conflicts with the decisions of two other state courts. *See* Pet. at 16-17 (citing *Granat v. Keasler*, 663 P.2d 830 [Wash. 1983]; *Kennedy v. City of Seattle*, 617 P.2d 713 [Wash. 1980] and *Polednak v. Rent Control Board of Cambridge*, 494 N.E.2d 1025 [Mass. 1986]). These cases, however, do not provide any such conflict or "split". To be sure, in each case, the court struck down a law which placed restrictions on an owner's ability to take his property off the rental market and occupy it for his own enjoyment. Nevertheless, in none of these cases did the court even suggest that under reasonable circumstances, such as where the tenants are elderly or otherwise long-standing occupants, the government could not prevent the eviction of tenants by an owner seeking to occupy the premises. Rather, in each of the cases cited by petitioners, the law was struck down because of a unique factor which placed unreasonable limits on the owner. *See Granat*, 663 P.2d 830 (landlord prohibited from the intended use of the property, but not the tenant); *Kennedy*, 617 P.2d at 713 (landlord required to locate a nonexistent moorage for a houseboat owner in order to evict the owner and occupy the site himself); *Polednak*, 494 N.E.2d 1025 (retroactive application of ordinance prevented resident tenant who later purchased apartment to continue to occupy unit).

CONCLUSION

BY REASON OF THE FOREGOING, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

Dated: New York, New York
November 9, 1994

Respectfully submitted,

G. OLIVER KOPPELL
Attorney General of the
State of New York
Attorney for Respondent
Donald M. Halperin
120 Broadway
New York, New York 10271
(212) 416-8618

JERRY BOONE
Solicitor General
Counsel of Record

CHARLES F. SANDERS
JUNE DUFFY
Assistant Attorneys General
of Counsel